

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 981.

THE UNITED STATES, PLAINTIFF IN ERROR,

FRED NICH.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA.**

FILED OCTOBER 29, 1915.

(94964)

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED NICE.

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Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
 FRED NICE, DEFENDANT IN ERROR. } Writ of error.

United States of America, ss.

The President of the United States of America to the Honorable James D. Elliott, judge of the District Court of the United States for the District of South Dakota, greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the decision and judgment sustaining the demurrer of the defendant, Fred Nice, to the indictment and dismissing said indictment in that certain cause in the said District Court of the United States for the District of South Dakota, Western Division, before you, in which the United States of America is plaintiff and the said Fred Nice is defendant, a manifest error hath happened, to the great damage of the said plaintiff, the United States of America, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

5 the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty (30) days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 25 day of September, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and fortieth.

[SEAL.]

OLIVER S. PENDAR,

*Clerk of the District Court of the United States,
 Western Division, Sioux Falls, South Dakota.*

The above writ of error is hereby allowed.

JAS. D. ELLIOTT,

*District Judge of the United States District
 Court for the District of South Dakota.*

UNITED STATES OF AMERICA,

Western Division, District of South Dakota, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the District Court, at office in city of Sioux Falls, this 12 day of October, A. D. 1915.

[SEAL.]

OLIVER S. PENDAR,
Clerk of said Court.

6 I hereby certify that a copy of the within writ of error was on the 25 day of September, A. D. 1915, lodged in the clerk's office of the said United States District Court for the District of South Dakota for the said defendant in error.

[SEAL.]

OLIVER S. PENDAR,
*Clerk of the United States District Court for the
District of South Dakota, Western Division.*

No. 798 W. Div. In the Supreme Court of the United States. The United States of America, plaintiff in error, vs. Fred Nice, defendant in error. Writ of error. Filed September 25, 1915. Oliver S. Pendar, clerk.

7 In the District Court of the United States of America in and for the Western Division of the District of South Dakota.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

FRED NICE, DEFENDANT.

No. 798 W. D.

Be it remembered that on the 20th day of May, A. D. 1915, the grand jurors came into court and presented to the court and filed an indictment against Fred Nice, charging him with the crime of unlawfully selling spirituous liquor to an Indian, which said indictment is in words and figures the following, to wit:

8 The District Court of the United States of America for the Western Division of the District of South Dakota, in the Eighth Judicial Circuit.

At a stated term of the District Court of the United States of America for the Western Division of the District of South Dakota, begun and held at the city of Deadwood, within and for the district and circuit aforesaid, on the third Tuesday of May, in the year of our Lord one thousand nine hundred and fifteen;

The grand jurors of the United States of America, good and lawful men, summoned from the body of the district aforesaid, then and there being duly empaneled, sworn, and charged by the court aforesaid to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Fred Nice, late of the town of Carter, in the county of Tripp and State of South Dakota, in said district, heretofore, to wit, on or about the ninth day of August, in the year of our Lord one thousand nine hundred and fourteen, with force and arms, at the town of Carter, in the county of Tripp, in the State of South Dakota, in the district aforesaid, and within the exclusive jurisdiction of this court, then and there wilfully, knowingly, unlawfully, and feloniously certain spirituous, vinous, and malt liquors, to wit, one pint of alcohol, one pint of whiskey, one pint of brandy, one pint of gin, one pint of beer, one pine of ale, and five pints of other spirituous, vinous, and malt liquors, did sell, give away, dispose of, exchange, and barter to one George Cortier, an Indian of the Sioux Tribe of Indians, which said Indian was then and there under the charge of Charles L. Davis, a duly appointed Indian agent of the United States, and an Indian of the Sioux Tribe of Indians, over which said Indian the Government of the United States then and there, through its departments, exercised guardianship, and an Indian to whom, on the 29th day of April, 1902, an allotment of land was made by the United States, and the title to which land the Government of the United States then and there held in trust for said Indian, contrary to the form, force, and effect of the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America.

ROBERT P. STEWART,

United States Attorney for the District of South Dakota.

Names of witnesses sworn and examined before the grand jurors: E. G. Boyd, J. Conklin, Geo. Cortier, C. Rostall.

(Endorsed:) No. 798. United States District Court, District of So. Dak., Western Division. The United States of America vs. Fred Nice. Indictment, selling and giving liquor to an Indian, viol. sec. 2139 as amended. A true bill James S. Smith, foreman. Filed this 20 day of May, A. D. 1915. Oliver S. Pendar, clerk. Bail fixed in sum of \$500.00, to be approved by clerk of this court, this 26th day of May, 1915. By the court, Jas. D. Elliott, judge.

10 And afterwards, to wit, on the 7th day of September, A. D. 1915, there was filed in the office of the clerk of said court demurrer to indictment, which said demurrer is in words and figures the following, to wit:

In the District Court of the United States of America in and for the District of South Dakota, Western Division.

UNITED STATES OF AMERICA, PLAINTIFF,	} #798. Demurrer.
vs.	
FRED NICE, DEFENDANT.	

Comes now the defendant above named and demurs to the indictment herein for the reason that the matters therein contained, and

the form, as the same are therein stated and set forth, are not sufficient in law, and that the said Fred Nice is not bound, by law, to answer the same; and that said indictment does not state facts constituting a public offense against the laws of the United States.

GEORGE A. JEFFERS,

Attorney for Defendant.

(Endorsed:) No. 798 W. D. In United States District Court, District of South Dakota, Western Division. United States of America vs. Fred Nice, defendant. Demurrer to indictment. Geo. A. Jeffers, attorney for defendant. Filed Sept. 7th, 1915. Oliver S. Pendar, clerk. By Margaret O. Crady, deputy.

And afterwards, to wit, on the 8th day of September, A. D. 1915, there was filed in the office of the clerk of said court order sustaining demurrer, which said order is in words and figures the following, to wit:

11 In the District Court of the United States within and for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 798 W. D. Order
<i>vs.</i>	
FRED NICE, DEFENDANT.	
	sustaining demur-
	rer to indictment.

This matter coming on to be heard before the judge of the above-entitled court, at the court room thereof, at Deadwood, South Dakota, on the 7th day of September, A. D. 1915, upon indictment No. 798 W. D., returned against the defendant herein, and upon the demurrer of the defendant thereto, George Jeffers, Esq., appearing for the defendant and in support of the said demurrer, and Robert P. Stewart, United States district attorney, appearing in opposition thereto; and the court having heard the argument of counsel and considered the briefs filed herein by the respective parties, and the court having considered the said indictment and the allegations thereof, and the court having construed the decision of the United States Supreme Court in the case of *In re Hoff* (197 U. S., 488), and the act of Congress of February 8th, 1887 (24 Stat., 388), and the act of Congress of May 8th, 1906 (34 Stat., 182), and the act of Congress of January 30th, 1897 (29 Stat., 506), and the United States Revised Statutes, section 2139 as amended by the said act of January 30th, 1897 (29 Stat., 506), being the statutes of the United States upon which said indictment is founded, and being satisfied that this court does not have jurisdiction of the person of the defendant herein or of the offense charged in said indictment, and that said indictment does not state facts sufficient to charge the de-

12 defendant with the commission of any offense against the laws of the United States, and the said judgment of this court being based upon a consideration of and construction by the court of the statutes of the United States above referred to, and not

upon the meaning of or the insufficiency of the language used in the said indictment, it is ordered and adjudged that the demurrer of the defendant, Fred Nice, to the said indictment No. 798 W. D. be, and the same is hereby, sustained, and the said indictment is hereby ordered dismissed.

Done in open District Court this 8th day of September, A. D. 1915.

By the court:

JAS. D. ELLIOTT,

*Judge of the United States District Court
for the District of South Dakota.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk.*

To which decision and judgment of the court so for the reasons and upon the grounds aforesaid sustaining the demurrer to the indictment herein and ordering said indictment dismissed, and to the whole of said decision and judgment, the United States of America, by its attorney, Robert P. Stewart, United States district attorney for the District of South Dakota, hereby excepts, which said exception is by the court allowed, and the clerk of this court is ordered to enter the said exception upon the minutes of this court.

Done in open District Court this 8th day of September, A. D. 1915.

By the court:

JAS. D. ELLIOTT,

*Judge of the United States District Court
for the District of South Dakota.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk.*

13 (Endorsed:) No. 798 W. D. In the District Court of the United States for the West. Div. of South Dakota. The United States of America, plaintiff, vs. Fred Nice, defendant. Order sustaining demurrer. Filed September 8, 1915. Oliver S. Pendar, clerk. By C. C. Schwarz, deputy.

And, to wit, on the same day, there was filed in the office of the clerk of said court certificate of judge, which said certificate is in words and figures the following, to wit:

In the District Court of the United States within and for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} Certificate of judge.
<i>vs.</i>	
FRED NICE, DEFENDANT.	
	} No. 798 W. D.

I, the undersigned, James D. Elliott, United States district judge for the District of South Dakota, do hereby certify that the decision and judgment in the above-entitled cause, given, made, rendered, and entered by this court on the 8th day of September, A. D. 1915,

and which said decision and judgment the United States of America is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer of the defendant to the indictment was sustained and the said indictment dismissed, was based solely upon the construction by this court of the act of Congress of February 8th, 1887 (24 Stat., 388), the act of Congress of May 8th, 1906 (34 Stat., 182), and the act of Congress of January 30th, 1897 (29 Stat., 506), and the United States Revised Statutes, section 2139 as amended by the said act of January 30th, 1897 (29 Stat., 506), being the statutes and acts of Congress of the United States upon which said indictment is founded, and that by reason of said construction of the said acts and statutes this court is of the opinion that it does not have jurisdiction of the offense charged in said indictment nor of the defendant, and that said indictment does not state facts sufficient to constitute an offense under the laws of the United States.

Done in open District Court in Deadwood, South Dakota, this 8th day of September, A. D. 1915.

By the court:

JAS. D. ELLIOTT,
*Judge of the United States District Court
for the District of South Dakota.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) No. 798 W. D. In the District Court of the United States for the West. Div. of South Dakota. The United States of America, plaintiff, vs. Fred Nice, defendant. Certificate of judge. Filed September 8, 1915. Oliver S. Pendar, clerk. By C. C. Schwarz, deputy.

And afterwards, to wit, on the 25th day of September, A. D. 1915, there was filed in the office of the clerk of said court assignment of errors, which said assignment of errors is in words and figures the following, to wit:

In the District Court of the United States for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} Assignment of errors.
vs.	
FRED NICE, DEFENDANT.	

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above-entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors upon which the United States of America will rely for a reversal of the decision and judgment of the above-entitled court herein and in the prosecution of a writ of error in the above-entitled cause:

I.

That the District Court of the United States in and for the District of South Dakota, Western Division, erred in sustaining the demurrer interposed by the defendant, Fred Nice, to the indictment in said cause, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

II.

That the said District Court erred in ordering said indictment dismissed, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

III.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

IV.

That the said District Court erred in holding, deciding, and adjudging that the said District Court did not have jurisdiction of the offense charged in said indictment, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

V.

16 That the said District Court erred in holding, deciding, and adjudging that the said District Court did not have jurisdiction of the person of the defendant named in said indictment, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

VI.

That the said District Court erred in holding, deciding, and adjudging that the said indictment did not state facts sufficient to charge the defendant with the commission of any offense under the provisions of section 2139, Revised Statutes of the United States, as amended by the acts of Congress of February 27th, 1877, July 23rd, 1892, and January 30th, 1897 (29 Stat., 506), to which decision and judgment the plaintiff duly excepted and its exception was allowed.

VII.

That the said District Court erred in its construction of the act of Congress of January 30, 1897 (29 Stat., 506), wherein and whereby

it held and decided that by reason of the decision of the Supreme Court of the United States in the case of *In re Heff* (197 U. S., 488) the said act of Congress did not give the said District Court jurisdiction of the offense charged in said indictment or of the defendant named therein, and that said indictment did not state facts sufficient to charge the defendant with the commission of any offense against the laws of the United States, to which ruling the plaintiff duly excepted and its exception was allowed.

VIII.

That said District Court erred in refusing to overrule said demurrer of the said defendant and in refusing to compel said defendant to plead to the indictment.

Wherefore the United States of America, plaintiff herein, prays that said decision and judgment of the said District Court of the United States for the District of South Dakota, Western Division, and the whole thereof, be in all things reversed, and that the said United States District Court be directed to reinstate said indictment and to overrule the demurrer of the said defendant and compel said defendant to plead to the indictment in said cause.

THE UNITED STATES OF AMERICA,

By R. P. STEWART,

United States Attorney for the District of South Dakota.

(Endorsed:) No. 798 W. D. In the District Court of the United States for the West. Div. of South Dakota. The United States of America, plaintiff, vs. Fred Nice, defendant. Assignment of errors. Filed September 25, 1915. Oliver S. Pendar, clerk. By C. C. Schwarz, deputy.

And, to wit, on the same day, there was filed in the office of the clerk of said court petition for writ of error, which said petition is in words and figures the following, to wit:

In the District Court of the United States for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF.	} No. 798 W. D. Crim.
<i>vs.</i>	
FRED NICE, DEFENDANT.	
	Petition for writ
	of error.

The United States of America, plaintiff in the above-entitled action, feeling itself aggrieved by the decision and judgment of the above-entitled court rendered, given, made, and entered on the 8th day of September, A. D. 1915, sustaining the demurrer of the above-named defendant to the indictment in this action and dismissing said indictment, comes now and petitions said court for an order allowing said plaintiff, the United States of America, to procure a writ of error to the honorable the Supreme

Court of the United States from said decision and judgment, and the whole thereof, under and according to the laws of the United States, and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, chapter 2564 (34 Stat., 1246), in that behalf made and provided, and the said United States of America prays that said petition for said writ of error may be allowed, and that said writ of error may issue, and that a proper transcript of the record, proceedings, and papers upon which said decision and judgment was given, made, and entered as aforesaid, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 24th day of September, A. D. 1915.

THE UNITED STATES OF AMERICA,

By R. P. STEWART,

United States Attorney for the District of South Dakota.

(Endorsed:) No. 798 W. D. In the District Court of the United States for the West. Div. of South Dakota. The United States of America, plaintiff, vs. Fred Nice, defendant. Petition for writ of error. Filed September 25, 1915. Oliver S. Pendar, clerk. By C. C. Schwarz, deputy.

And, to wit, on the same day, there was filed in the office of the clerk of said court order allowing writ of error, which said order is in words and figures the following, to wit:

19 In the District Court of the United States for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} Order allowing writ of
vs.	
FRED NICE, DEFENDANT.	

Upon reading and filing the petition of the United States of America, plaintiff in the above-entitled cause, praying for the allowance of a writ of error in the above-entitled cause, returnable before the Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of Robert P. Stewart, United States attorney for the District of South Dakota:

It is hereby ordered that said petition be, and the same hereby is allowed and granted; and

It is further ordered that a writ of error be, and the same hereby is, allowed to have reviewed in the Supreme Court of the United States the decision and judgment sustaining the demurrer of the defendant to the indictment and dismissing said indictment herein, heretofore given, made, rendered, and entered in the above-entitled cause, and that said writ of error be issued by the clerk of this court, under the seal of this court, pursuant to the laws of the United States in that behalf made and provided; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States; and

It is further ordered that pending the prosecution and determination of said writ of error the defendant, Fred Nice, shall be admitted to bail on his own recognizance.

20 Dated this 25th day of September, A. D. 1915.

By the court:

JAS. D. ELLIOTT,
*Judge of the United States District Court
for the District of South Dakota.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk,*
By C. C. SCHWARZ, *Deputy.*

(Endorsed:) No. 798 W. D. In the District Court of the United States for the West. Div. of South Dakota. The United States of America, plaintiff, vs. Fred Nice, defendant. Order allowing writ of error. Filed September 25, 1915. Oliver S. Pendar, clerk. By C. C. Schwarz, deputy.

And afterwards, to wit, on the same day, there was filed in the office of the clerk of said court stipulation for record on appeal, which said stipulation is in words and figures the following, to wit:

21 In the District Court of the United States within and for the District of South Dakota, Western Division.

THE UNITED STATES OF AMERICA,	} Stipulation as to record on writ
plaintiff in error,	
vs.	
FRED NICE, DEFENDANT IN ERROR.	} of error from the District Court of U. S., District of South Dakota.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the transcript of the record in the above-entitled cause on writ of error to the Supreme Court of the United States from the United States District Court for the District of South Dakota shall consist of the indictment, demurrer to the indictment, order sustaining demurrer to the indictment, certificate of the judge, petition for writ of error, order allowing writ of error, assignment of errors, writ of error and citation, and the clerk of the United States District Court for the District of South Dakota is hereby directed to prepare such transcript of the record in said cause, as hereinbefore stipulated.

R. P. STEWART,
Attorney for Plaintiff in Error.
W. B. BACKUS,
W. J. HOOPER,
O. D. OLMSTEAD,
Attorneys for Defendant in Error.

(Endorsed:) No. 798 W. D. In the District Court of the United States District of South Dakota, Western Division. The United States of America, plaintiff in error, vs. Fred Nice, defendant in error. Stipulation. Filed September 25, 1915. Oliver S. Pendar, clerk.

22 UNITED STATES OF AMERICA,
Western Division, District of South Dakota, ss:

I, Oliver S. Pendar, clerk of the District Court of the United States in and for the District of South Dakota, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 21 pages, numbered consecutively from 1 to 21, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders, and all other proceedings in the case of the United States of America, plaintiff, vs. Fred Nice, defendant, and of the whole thereof, as enumerated in the written stipulation of the party appellant filed herein directing the clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said court, and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the admission of service thereof, the original writ of error with my return thereto, and in addition thereto a copy of said stipulation.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, in the said district, this 12th day of October, A. D. 1915.

[SEAL.]

OLIVER S. PENDAR, *Clerk.*

(Indorsement on cover:) File No. 24,964. South Dakota, D. C. U. S. Term No. 681. The United States, plaintiff in error, vs. Fred Nice. Filed October 27th, 1915. File No. 24,964.

(Stamped:) Office of the clerk, Supreme Court U. S. Received Oct. 27, 1915.



In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 681.
v.	
FRED NICE.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH DAKOTA.*

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant was indicted in the District Court of the United States for the District of South Dakota for selling whisky and other intoxicating liquors to one George Cortier, an Indian of the Sioux Tribe, to whom an allotment of land had been made under the Act of February 8, 1887, 24 Stat. 388, as amended, in violation of section 2139 of the Revised Statutes, as amended, prohibiting the sale of intoxicating liquors to Indians, etc.

Defendant demurred to the indictment on the grounds:

1. That the matters therein contained were insufficient in law and defendant was not bound by law to answer the same.

2. That it did not state facts constituting a public offense against the United States.

The demurrer was sustained, the District Court basing its judgment upon a consideration and construction of the statutes hereinbefore mentioned, and holding:

1. That it was without jurisdiction of the defendant.

2. That the indictment did not state facts sufficient to charge the defendant with any offense against the United States.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1915.

